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Nos. 07-588, 07-589, and 07-591

In The
Supreme Court of the United States

ENTERGY CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents,

PSEG FOSSIL, LLC, *et al.*,
Petitioner,

v.

RIVERKEEPER, INC., *et al.*,
Respondents,

UTILITY WATER ACT GROUP,
Petitioner,

v.

RIVERKEEPER, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS SUPPORTING PETITIONERS

Duane J. Desiderio
Thomas J. Ward
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

Daniel P. Albers*
**Counsel of Record*
Jeffrey S. Longsworth
David T. Ballard
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606-2809
(312) 357-1313

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INTEREST OF *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. As part of the construction and development process, its members commonly obtain Clean Water Act ("CWA") permits that must conform to any applicable effluent limitations and guidelines under sections 301 and 304 of the Act. NAHB has developed comprehensive familiarity with the CWA's permitting requirements and provides compliance advice to its members.

NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members. NAHB was a petitioner in a CWA case, *NAHB v. Defenders of Wildlife*, 551 U.S. ---, 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as an *amicus curiae* or "of counsel," in a number of matters involving landowners aggrieved by over-zealous regulation

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, *amicus* states that their counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

under a wide array of statutes and regulatory programs.

The question presented rests on interpretation of CWA section 316(b), concerning the technology that must be used to control effluent from cooling water intake structures. In construing section 316(b), the court of appeals has confused more than 30 years of case law interpreting other CWA sections that have more pertinence to the home building process, and has needlessly exposed those sections to new legal challenges. NAHB submits this brief to ensure that, regardless of whether the Court reverses or affirms, the scope of any decision here is limited to interpreting only CWA § 316(b), and does not disturb well-established precedent interpreting other CWA provisions that more directly regulate construction and development of housing.

SUMMARY OF ARGUMENT

The issue before the court of appeals was how to interpret a unique technology standard set forth by Congress in CWA section 316(b)—the "best technology available for minimizing adverse environmental impact" ("BTA")—for regulating cooling water intake structures at large, existing power plants.[2] Instead of conducting a proper *Chevron* analysis, the Second Circuit interpreted section 316(b) by borrowing interpretations of sections 301 and 306. In doing so, the Second Circuit wrongly interpreted sections 301 and 306, finding that those

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[2] The Second Circuit decision is reported as *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d. Cir. 2007).

provisions did not permit EPA to weigh costs and benefits in analyzing the "best available technology economically achievable" ("BAT") for setting effluent limitation guidelines, and the "best available demonstrated control technology" ("BADT") for setting new source performance standards, for industrial discharges.

The court below substituted its own interpretation of the section 316(b) for that of the agency. Under *Chevron*, the Second Circuit should have recognized that section 316(b) is ambiguous and deferred to EPA's reasonable interpretation of the phrase "best technology available for minimizing adverse environmental impact."

ARGUMENT

I. THROUGHOUT THE CLEAN WATER ACT CONGRESS VARIED TECHNOLOGY STANDARDS TO CONTROL EFFLUENT, AND THE DEGREE TO WHICH COST IS CONSIDERED WHEN ESTABLISHING THOSE TECHNOLOGIES.

A. Varying Technology Standards.

The question presented is whether EPA is authorized to conduct a cost-benefit analysis under section 316(b), in determining the applicable technology for cooling water intake structures. Section 316 covers "thermal discharges," and subsection (b) provides:

> Any standard established pursuant to [CWA sections 301 or 306] ... and applicable to a

> point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the *best technology available for minimizing adverse environmental impact.*

33 U.S.C. § 1326(b) (emphasis supplied). The Court must decide whether the words "best technology available for minimizing adverse environmental impact" ("BTA"), confer upon EPA the discretion to weigh costs and benefits when setting the applicable effluent control technology for cooling water intake structures. As discussed below, unlike other technology-setting provisions in the CWA, section 316(b) nowhere describes, defines, or lists the factors that EPA should use to define BTA. To flesh-out this congressional silence regarding water cooling intake technology, the court of appeals placed too much reliance on the factors set forth in sections 301, 304 and 306, concerning the effluent technologies for other types of pollutants and pollutant sources. An analysis of some of these other technology standards is instructive.

As a general matter, section 301(a) makes it illegal to discharge[3] any pollutant except in compliance with various provisions in the Act. 33 U.S.C. §§ 1311(a). One of those provisions that makes a discharge permissible is section 301(b), which sets a timetable for EPA to establish "effluent limitations" on point sources. *Id.* § 1311(b). These effluent limitations are

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[3] "Discharge of a pollutant" is defined as "(A) any addition of any pollutant to navigable waters from any point source ...." 33 U.S.C. § 1362(12)(A).

afforded regulatory effect through EPA's adoption and periodic revision of "effluent limitation guidelines" ("ELGs"), as provided in section 304(b), which among other things describes factors for the Agency to consider when establishing technologies to control various pollutant discharges. *Id.* § 1314(b). Similarly, under section 306, EPA must publish and periodically revise regulations establishing "national standards of performance" for certain categories of industrial sources enumerated in the statute, as well as new industrial sources that EPA determines should be regulated. *Id.* § 1316. In these various provisions, Congress used different technological standards to control effluent depending on whether the industrial source is new or existing, the type of pollutant at issue, and the effective date by which EPA was to promulgate new regulations.

For example, by July 1, 1977, EPA was to establish effluent limitations based on the "best practicable control technology currently available" ("BPT") for existing sources discharging pollutants (other than publicly owned treatment works). Section 301(b)(1)(A); *id.* § 1311(b)(1)(A). Then, by March 31, 1989, newer technology standards were to govern depending on whether the pollutant of concern was conventional, toxic, or non-conventional. By March 31, 1989, existing sources of conventional pollutants[4] were to be subject to effluent limitations applying

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[4] "Conventional pollutants" include biological oxygen demand, suspended solids (such as sediment), fecal coliform, and pH, and additional pollutants that EPA determines are conventional. 33 U.S.C. § 1314(a)(4). For example, EPA designated oil and grease as an additional conventional pollutant. 44 Fed. Reg. 44,501 (July 30, 1979).

"the best conventional pollutant control technology" ("BCT"). Section 301(b)(2)(E); *id.* § 1311(b)(2)(E).[5] By that same date, a different technology standard—the "best available technology economically achievable" ("BAT")—was to govern effluent limitations from existing sources of toxic and non-conventional pollutants. Section 301(b)(2)(A) (setting BAT standard); sections (b)(2)(C), (D) (1989 deadline for toxics); section (b)(2)(F) (1989 deadline for non-conventional pollutants). *Id.* §§ 1311(b)(2)(A), (C), (D) & (F).[6] Effluent limitations set forth pursuant to the BAT standard "shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him . . . that such elimination is technologically and *economically achievable* for a category or class of point sources as determined in accordance with regulations issued by the Administrator ...." Section 301(b)(2)(A); *id.* § 1311(b)(2)(A) (emphasis supplied).

Further, for appropriate *new* pollutant sources, Congress set different technology-based levels to control effluent. The Act authorizes EPA to set new source performance standards ("NSPS") "which reflect[] the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available

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[5] 33 U.S.C. § 1311(b)(2)(E) references § 1314(b)(4), which pertains to conventional pollutants.

[6] 33 U.S.C. § 1311(b)(2)(A) references subsections (C) and (D) which pertain to certain toxic pollutants. Subsection (b)(2)(A) also references subsection (F), for "all" remaining pollutants not covered elsewhere in subparagraph (2) (*i.e.*, non-conventional pollutants, which are neither conventional or toxic).

demonstrated control technology"—that is, "BADT." Sections 306(a)(1), (2); *id.* §§ 1316(a)(1), (2).

B. Varying Cost-Benefit Considerations Relative to Different Technology Standards.

The extent to which EPA must use economic and cost considerations, when establishing these different technology standards to control effluent, varies. Sometimes Congress explicitly directed EPA to consider cost; sometimes Congress provided that cost was a factor EPA may consider; sometimes Congress said nothing at all about cost. In other words, while the Act does not specifically define the various technology standards, it generally (but not always) enumerated specific factors EPA must consider in setting effluent limitation guidelines—and sometimes these include cost.

For example, under the initial BPT standard that was to be in effect by 1977, the Act directs that "[f]actors" EPA "shall" consider include, among other things, "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." Section 304(b)(1)(B); *id.* § 1314(b)(1)(B). Similarly, for the BCT standard to be in effect by 1989 regarding existing sources of conventional pollutants, a "factor[]" EPA "shall include" in setting effluent limitation guidelines is "consideration of the reasonableness of the relationship between the cost of attaining a reduction in effluents and the effluent reduction benefits derived ...." Section 304(b)(4)(B); *id.* § 1314(b)(4)(B). EPA has adopted regulations describing the "cost-

reasonableness" test it applies to determine BCT limitations. See 51 Fed. Reg. 24,974 (July 9, 1986).

For BAT regarding existing sources of toxic and non-conventional pollutants, section 304(b)(2)(B) does not mandate that EPA compare costs to benefits related to reductions in effluent discharges. *Id.* § 1314(b)(2)(B). Rather, that section leaves the weighing of enumerated factors, including "the cost of achieving such effluent reduction ...," to EPA's discretion. *Id.* See *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 516 (2d Cir. 2005); *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998); *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796 (6th Cir. 1995). EPA's view is that it "retains considerable discretion in assigning the weight accorded" to the statutory factors used to evaluate BAT, which includes the cost of achieving toxic and non-conventional effluent reductions. 71 Fed. Reg. 76,644, 76,646-47 (Dec. 21, 2006) ("Notice of Availability of Final 2006 Effluent Guidelines Program").

Similarly, Congress provided that in establishing new source performance standards ("NSPS"), EPA "shall take into consideration the cost of achieving such effluent reduction . . ." Section 306(b)(1)(B); *id.* § 1316(b)(1)(B). As EPA has stated, "[i]n establishing NSPS, [it] is directed to take into consideration the cost of achieving the effluent reduction and any non-water quality environmental impacts and energy requirements." 71 Fed. Reg. at 76,647 (Dec. 21, 2006).

CWA § 316(b)—the cooling water intake provision at issue in the case at bench—is significantly

different in scope and intent compared to these other sections. Section 316(b) includes a cross-reference to sections 301 and 306, but Congress did not equate or otherwise compare the disparate technology standards in these provisions. But it is evident that the text in section 316(b) is markedly different from the text in section 301. Section 316(b) requires "best technology available for minimizing adverse environmental impact"—language far different from section 301's "best available technology economically achievable" for existing sources of toxic and non-conventional pollutants. Compare *id.* § 1326(b) to *id.* § 1311(b)(2)(A). The focus of these respective provisions, on their face, is plainly dissimilar; section 316(b) focuses on environmental impacts, while section 301 focuses on economic achievability. EPA recognized the differences in exercising its discretion for the cooling water intake structure rule at issue, interpreting the phrase "minimizing adverse environmental impact" to define what constitutes "best" and "available" under section 316(b):

> Section 316(b) requires that cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. *In contrast to the effluent limitations provisions* [of section 301], the object of the "best technology available" is explicitly articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn.

69 Fed. Reg. 41,576, 41,583 (July 9, 2004).

The various technology standards discussed above, the scope of their application, and pertinent statutory language regarding cost, are tabulated below:

Acronym	Technology Standard	CWA Section	Scope of Application	Cost Considerations
BPT	Best Practicable Control Technology Currently Available	Section 301(b)(1)(A); 33 U.S.C. § 1311(b)(1)(A)	By July 1, 1977, effluent limitations were to reflect BPT for "classes and categories of point sources ...." That is, BPT applies to discharges of conventional, non-conventional, and toxic pollutants.	EPA "shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved ...." § 304(b)(1)(B); 33 U.S.C. § 1314(b)(1)(B).
BCT	Best Conventional Pollution Control Technology	Section 304(b)(2)(E); 33 U.S.C. § 1311 (b)(2)(E)	By March 31, 1989, effluent limitations were to reflect BCT for conventional pollutants.	"Factors" relating to EPA's assessment of BCT "shall include consideration of the reasonableness of the relationship between the costs of a attaining a reduction in effluents and the effluent reduction benefits derived ...." § 304(b)(4)(B); 33 U.S.C. § 1314(b)(4)(B).

Acronym	Technology Standard	CWA Section	Scope of Application	Cost Considerations
BAT	Best Available Technology Economically Achievable	Sections 301(b)(2)(A), (C), (D), (F); 33 U.S.C. §§ 1311(b)(2)(A), (C),(D),(F)	By March 31, 1989, effluent limitations were to reflect BAT for toxic pollutants, and for all other (*i.e.*, non-conventional) pollutants.	One "[f]actor" EPA "shall take into account" is "the cost of achieving such effluent reduction ...." § 304(b)(2)(B), 33 U.S.C. § 1314(b)(2)(B).
BADT	Best Available Demonstrated Control Technology	Sections 306(a)(1), (b)(2)(B); 33 U.S.C. § 1316(a)(1), (b)(2)(B)	New source performance standards ("NSPS")	EPA "shall take into consideration the cost of achieving such effluent reduction ...." § 306(b)(2)(B); 33 U.S.C. § 1316(b)(2)(B).
BTA	Best Technology Available for Minimizing Adverse Environmental Impact	Section 316(b); 33 U.S.C. § 1326(b)	Location, design and construction of cooling water intake structures	Not explicit.

II. THE COURT OF APPEALS' ANALYSIS OF COST CONSIDERATIONS REGARDING THE VARIOUS TECHNOLOGY STANDARDS IS FLAWED.

A. The Court of Appeals' Analysis Placed Undue Weight on Sections 301 and 306 Which are Far Broader in Scope than Section 316, Which Deals *Only* With Cooling Water Intake Structures.

In interpreting section 316(b) to determine if it authorized EPA to conduct a cost-benefit analysis for cooling water intake structures, the court of appeals relied on unnecessary extrapolations of sections 301 and 306. It stated, "[o]ur interpretation of section 316(b) is informed by the two provisions it cross-references, CWA sections 301 and 306." *Riverkeeper, Inc.*, 475 F.3d at 90. Indeed, the Second Circuit assessed the "Cost Analysis Pursuant to Sections 301 and 306," because section 316(b) "does make specific reference to CWA sections 301 and 306, which we have taken previously as 'an invitation' to look to those sections for guidance in 'discerning what factors Congress intended the EPA to consider in determining' BTA." *Id.* at 97 (quoting *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 186 (2d Cir. 2004). The Second Circuit conducted this analysis, despite the fact that it also acknowledged that "Section 316(b) does not itself set forth or cross-reference another statutory provision enumerating the specific factors that the EPA must consider in determining BTA." *Id.*

The court of appeals recognized that in 1989, when the BPT standard was replaced by the BAT standard,

section 301(b)(2)(A) authorized EPA to consider "the cost of achieving such effluent reduction" in determining BAT. *Riverkeeper*, 475 F.3d at 97 (quoting 33 U.S.C. § 1314(b)(2)(B)). The lower court further stated that in contrast to the older BPT standard, "[i]n determining BAT ... the EPA may consider cost as a factor to a limited degree, ... but only as to whether the cost of a given technology could be reasonably borne by the industry and not the relation between that technology's cost and the benefits it achieves." *Id.* at 98. Thus, the Second Circuit held that EPA could only conduct a "cost-effectiveness" analysis for determining BAT. *Id.* at 98.

The lower court also briefly examined section 306. It recognized that new source performance standards under that section must reflect BADT. *Id.* It further found that "Congress provides that in establishing standards of performance, the EPA 'shall take into consideration the cost of achieving such effluent reduction,' ... but did not require the EPA to conduct cost-benefit analysis." *Id.* (quoting 33 U.S.C. § 1316(b)(1)(B)). Thus, the Second Circuit held that for both sections 301 and 306, "after 1989, cost is a lesser, more ancillary consideration in determining what technology the EPA should require for compliance under those sections." *Id.* The court of appeals concluded that "[t]he shift from the BPT standard to the more stringent BAT one clearly signaled Congress's intent to move cost consideration under the CWA from cost-benefit analysis to a cost-effectiveness one." *Id.* The Second Circuit thus found that its analysis "strongly suggests" that EPA is not

authorized to conduct a cost-benefit analysis under sections 301 and 306. *Id.*

The court of appeals drew questionable inferences from section 301 (which pertains broadly to existing sources across the spectrum of conventional, non-conventional, and toxic pollutants) and from section 306 (which pertains generally to new sources of effluent discharge). However, the only provision before it to consider was section 316(b), which imposes a technology standard uniquely applicable to cooling water intake structures. As shown below, it was erroneous for the court of appeals to use sections 301 and 306 to conclude that EPA was precluded from conducting a cost-benefit analysis in determining BADT.

B. Contrary to the Court of Appeals' Interpretation, Congress Authorized Cost-Benefit Analysis to Establish Technology Standards Under Sections 301, 304 and 306.

Under sections 301, 304, and 306, EPA is plainly authorized to evaluate cost considerations for BAT and BADT. The court of appeals was wrong to state otherwise.

As noted, in attempting to divine the meaning of section 316(b) for BTA regarding cooling water intake structures, the court of appeals stated that sections 301 and 306 "informed" its analysis. *Riverkeeper,* 475 F.3d at 90. The CWA's very language in section 301(b)(2)(A), which sets forth the BAT standard applicable to existing sources of toxic and non-

conventional pollutants, explicitly provides that EPA take costs and economic feasibility into account for assessing the "best available technology *economically achievable*." 33 U.S.C. § 1311(b)(2)(A) (emphasis added). On its face, the very premise of the BAT standard depends on whether the technology can be achieved *at all*, in light of cost; the text does not predicate BAT on cost efficiencies, and does not describe BAT as the "best available and most efficient" method to control toxic or non-conventional effluent. Further, Congress expressly provided that EPA can consider numerous factors for BAT, including "the cost of achieving such effluent reduction ...," as well as "such other factors as the Administrator deems appropriate ...." *Id.* § 1314(b)(2)(B). And in similar language for new source performance standards, section 304(b)(1)(B) likewise states that EPA can consider "the cost of achieving such effluent reduction . . ." 33 U.S.C. § 1316(b)(1)(B).

Thus, under the plain text of the provisions to which the lower court turned for guidance, it was inappropriate to conclude that EPA may not conduct cost-benefit analyses for the BAT and BADT standards. Moreover, the lower court was selective in the statutory sections it chose to examine. While it *said* it would look to section 301 and went on to consider subsection (b)(2)*(A)*, it totally *ignored* subsection (b)(2)*(E)*, which sets the BCT standard for existing sources of conventional pollutants. See *id.* § 1311(b)(2)(E). And, Congress indisputably directed EPA to weigh costs against when establishing BCT effluent guidelines. The Act directs that "[f]actors" relating to EPA's assessment of BCT "shall include consideration of the reasonableness of the

relationship between the *costs* of a attaining a reduction in effluents and the effluent reduction *benefits* derived ...." See *id.* § 1314(b)(4)(B) (emphasis supplied). Indeed, EPA has adopted regulations describing the "cost-reasonableness" test it uses when establishing BCT limitations for industrial point sources discharging conventional pollutants. See 51 Fed. Reg. 24,974 (July 9, 1986).

Other courts have not taken the selective or restrictive approach used here by the court of appeals. They have found that EPA has the discretion to (and does) evaluate costs in setting technology standards under sections 301 and 306. *See BP Exploration & Oil*, 66 F.3d at 796 ("NRDC is wrong to contend that EPA is not permitted to balance factors such as cost against effluent reduction benefits"); *Waterkeeper Alliance*, 399 F.3d at 516 ("if the EPA determines, with adequate support in the record, that a given set of costs cannot reasonably be borne by a given industry, courts must defer to that determination"); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002) ("appellate courts give EPA considerable discretion to weigh and balance the various factors required by statute to set NSPS"); *Tex. Oil & Gas*, 161 F.3d at 928 (5th Cir. 1998) ("The EPA . . . has considerable discretion in evaluating the relevant factors and determining the weight to be accorded to each in reaching its ultimate BAT determination.").

Thus, under sections 301, 304 and 306, EPA is afforded wide discretion to place significant weight to cost considerations. The agency is authorized, but not required, to assess those costs in relation to benefits when determining BAT and BADT. The court of

appeals' decision that EPA is *prohibited* from assessing costs for these technologies is unprecedented and should be reversed.

C. The Court of Appeals Misinterpreted This Court's Decision in *EPA v. Nat'l Crushed Stone Ass'n*.

The court of appeals relied on *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980), to assert that EPA is prohibited from conducting a cost-benefit analysis for BAT. But its interpretation of that case was erroneous. In examining the factors that EPA can evaluate for BPT and BAT, this Court first found that EPA must consider the various factors for adopting effluent limitation guidelines under section 304(b)(1)(B). *Id.* at 70. The Court then decided that the factors under section 304(b)(2)(B) to determine BAT do not *mandate* that EPA conduct a cost-benefit assessment, as is required for BPT. *Id.* at 71. The Court stated that "Section 304(b)(2)(B) lists 'cost' as a factor to consider in assessing BAT, although *it does not state that costs shall be considered in relation to effluent reduction.*" *Id.* at 71, n.10 (emphasis added).

The court of appeals, however, misinterpreted *National Crushed Stone*, by construing the lack of a mandate to compare costs and benefits under section 304(b)(2)(B) as a blanket *prohibition* against such analysis. The lower court should have followed the Fifth Circuit's opinion in the *Texas Oil & Gas* case, which correctly explained that *National Crushed Stone* stands only for the proposition that "EPA is *not obligated* to evaluate . . . the relationship between costs and benefits." *Tex. Oil & Gas*, 161 F.3d at 936

(citing *Nat'l Crushed Stone*, 449 U.S. at 71) (emphasis added).

D. The Court of Appeals' *Chevron* Analysis was Incorrect.

In the end, the court of appeals should have conducted a proper *Chevron* analysis of section 316(b) and deferred to EPA's reasonable interpretation of that provision. As it admitted, "Section 316(b) does not itself set forth or cross-reference another statutory provision enumerating the specific factors that the EPA must consider in determining BTA." *Riverkeeper*, 475 F.3d at 97. Under a correct *Chevron* analysis, the Second Circuit's admission that the language of the statute was silent should have mobilized it to move on to "Step 2," and assess whether EPA's interpretation of section 316(b), a statute that the agency administers, was reasonable. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (If a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). Moreover, section 316(b)'s cross-reference to sections 301 and 306, at best, creates an ambiguity which should have triggered deference to EPA's interpretation. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 127 S. Ct. 1423, 1433 (2007) (a "cross-reference alone is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition ....")

The lower court opinion guts the bedrock principle that where a statute is silent as to the question at issue, "a court may not substitute its own

construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 476 U.S. at 844. Instead of deciding whether EPA's interpretation of section 316(b) was a permissible construction of the statute, it leaped to sections 301 and 306—provisions with different language, purposes, and far broader purviews than cooling water intake structures. As thoroughly discussed by the other parties' briefs, EPA's construction of section 316(b) was reasonable, and thus, the Second Circuit should have deferred to that fair construction.

The court of appeals' overly-heavy reliance on sections 301 and 306, when interpreting section 316(b), was certainly misplaced. Even though these sections must by their very nature share some of the same words, the Court has recognized that the same words can have different meanings when used in different contexts of the same statute:

> [M]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.

Envtl. Def., 127 S. Ct. at 1432 (2007) (citation omitted). Indeed, although BTA and BAT share similar words, those words appear in different contexts. Section 304's BAT standard refers to the "best available technology *economically achievable*" in section 301. 33 U.S.C. §§ 1314(b)(2)(B) & 1311(b)(2)(A) (emphasis added). In contrast, section 316(b) provides for standards that reflect the "best technology available for minimizing adverse

environmental impact." 33 U.S.C. § 1326(b). Based on the plain language of the provisions, section 301's terms focus on technological and economic feasibility, while section 316(b)'s terms focus on minimizing adverse impacts—two dissimilar goals.

Because the Second Circuit rendered a decision that is inconsistent with prior case law, failed to conduct a proper *Chevron* analysis, and failed to recognize the differences in language between statutory provisions, this Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Duane J. Desiderio
Thomas J. Ward
NATIONAL
ASSOCIATION OF
HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

Daniel P. Albers
Counsel of Record
Jeffrey S. Longsworth
David T. Ballard
BARNES &
THORNBURG LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606-2809
(312) 357-1313

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547

U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); and *Summers v. Earth Island Inst.*, No. 07-463, *cert. granted*, 128 S.Ct. 1118 (2008).